

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by David Beaulieu,  
Commissioner, Department of Human  
Rights,

Complainant,

ORDER RELATING TO HEARING  
AND LITIGATION COSTS AND  
OTHER DAMAGES

v.

City of Minneapolis,

Respondent.

The above-entitled matter is now before Administrative Law Judge Allen E. Giles after issuance of PARTIAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (hereinafter also referred to as the "Partial Order") on October 30, 1997, which scheduled a hearing for January 9, 1998 to address issues relating to other damages, attorney's fees and other hearing and litigation costs.

Carl M. Warren, Attorney at Law, and Gregory Karpenko, Certified Student Attorney, Civil Practice Clinic, University of Minnesota, 190 Law Center, 229 - 19th Avenue South, Minneapolis, Minnesota 55455, represented Complainant, the Commissioner of the Department of Human Rights.

Deborah A. Styles, Assistant City Attorney, 300 Metropolitan Centre, 333 South Seventh Street, Minneapolis, Minnesota 55402-2453, represented the Respondent, the City of Minneapolis.

No further oral testimony is necessary; neither Party has requested a hearing, decisions on the matters at issue will be based on the affidavits submitted by the Parties. For purposes of the decisions made herein, the record closed on January 14, 1998, the date of receipt of Complainant's Reply correspondence.

**NOTICE**

This Order is the **final decision** in this contested case proceeding under Minn. Stat. § 363.071. Pursuant to Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69. An appeal must be filed within 30 days of the date of this Order.

## STATEMENT OF ISSUES

What are the Minnesota Human Rights Department's hearing and litigation costs?

Whether Complainant's request for attorney's fees are reasonable.

Whether Complainant's additional damages are reasonable, and if so, whether it is appropriate to award them in this proceeding.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. On October 30, 1997, the PARTIAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER was issued in this docket. The Partial Order concluded that Respondent committed unfair discriminatory practices in violation of the Minnesota Human Rights Act, Minnesota Statutes, Chapter 363 by discrimination on the basis of marital status, sex and by reprisal.

2. The Partial Order scheduled a hearing for January 9, 1998 on additional damages and costs. The Parties were directed to submit argument and evidence regarding reasonable attorney's fees, hearing and litigation costs incurred by the Minnesota Department of Human Rights and Katherine Smulski's other compensatory losses.

3. On December 5, 1997, Complainant filed a petition for additional damages, costs and attorney's fees. The Partial Order required that Respondent file a response within 20 days. Respondent failed to file a response or request an extension within 20 days. On December 30 an Order was issued canceling the hearing scheduled for January 9, 1998 because it appeared that the Respondent did not contest the details of Complainant's request for additional damages and costs.

4. The December 30th Order gave Respondent another opportunity (until January 9, 1998) to file opposition, if any, to Complainant's request for additional damages, costs and attorney's fees. On January 9, 1998, Respondent filed a response contesting the details of Complainant's claim for additional lost Sergeant's wages. Respondent does not challenge the details of Complainant's claims for attorney's fees or other hearing and litigation costs.

### Hearing and Litigation Costs

5. Complainant's claims for hearing and litigation expenses include expenses in three categories of costs: (a) attorney's fees; (b) Office of Administrative Hearings billing costs; and (c) miscellaneous hearing costs. These costs are exhaustively detailed in the Affidavit of Carl Warren, Appendices I and II.

#### (a) Attorney's Fees

6. Complainant was represented in this proceeding by the University of Minnesota Civil Practice Clinic (hereinafter "Civil Practice Clinic"). The Civil Practice Clinic is a nonprofit legal services organization. The Civil Practice Clinic operates with a faculty of five and one-half full-time attorneys who supervise certified student attorneys practicing under the Minnesota Student Practice Rules. In the instant litigation, legal representation was provided by Carl Warren as supervising attorney and several certified student attorneys. Carl Warren has practiced law since 1975.

7. In 1991 the mean billing rate for an attorney (admitted to the Bar in 1975) practicing in a law firm of up to nine attorneys was \$155 per hour. R. Hayden, "Billing Rate Survey: Minnesota Law Firms" (September 1991). Affidavit of Carl Warren, Appendix III. Instead of reimbursement at this level (\$155 per hour), Complainant has requested hourly rates charged by the Attorney General's Office: \$70 per hour for work performed by supervising attorney Carl Warren and \$55 per hour for work performed by the student attorneys.

8. Student and attorney's fees were only computed for work that produced a physical product and for time spent in pretrial or trial proceedings. Time spent for discussions, meetings or observation were excluded.

9. Complainant requests attorney's fees for attorney and student time in the following categories: Correspondence, Depositions, Memo Preparation, Pleadings, Court Appearances and Transcript Summary. The following table summarizes the attorney and student hours upon which the request for attorney's fees is based:

#### **Hours Requested for Attorney's Fees**

<u>Hours</u>	<u>Student Hours</u>	<u>Attorney</u>
Correspondence	11.5	7.9
Depositions	29.0	45.1
Memos	33.5	--
Pleadings	352.2	51.1
Court Appearances	182.8	223.6
Transcript Summary	<u>156.</u>	<u>--</u>
Total Hours	765	327.7

10. Complainant requests a recovery of attorney's fees consisting of 765 hours at the student rate for a total of \$42,075 and a recovery of 327.7 hours at the attorney hourly rate for a total of \$22,939. The total attorney's fees request amounts to \$65,014.

(b) Costs Billed by the Office of Administrative Hearings

11. For the time period August 1995 through October 1997, the Office of Administrative Hearings billed the Department of Human Rights \$90,032.00. These costs include ALJ and Court Reporter hearing time, record transcription and preparation costs, including costs of transcripts and ALJ report writing time. All of these costs are documented in Appendix II of Carl M. Warren's Affidavit.

(c) Miscellaneous Costs

12. Complainant's request for miscellaneous costs include costs for depositions, witness fees, subpoenas and copying charges. These are primarily pretrial hearing costs that total \$4,074.58.

13. The documents supporting the hearing and litigation costs have been carefully reviewed and scrutinized by the Judge. The costs are reasonable and appropriately documented.

Additional Compensatory Losses

Travel Expenses

14. Because Katherine Smulski did not get the Burnsville police officer position, she had to continue to commute from her home in Apple Valley to Minneapolis. This commute resulted in travel expenses that would not have occurred had Katherine Smulski obtained the Burnsville police officer position. Complainant requests recovery for these travel expenses.

15. The travel expenses include mileage and parking costs. With respect to the mileage costs, Complainant assumes 50 round-trip miles for each day and 250 working days per year over a period of seven years at a cost of \$.28 per mile. Total mileage expenses claimed is \$24,500. Affidavit of Katherine Smulski, Appendix I.

16. In addition to additional mileage expenses, Katherine Smulski incurred additional parking expenses. The position with the Burnsville Police Department did not require her to pay any work-related parking expenses. Her position at the Minneapolis Police Department, however, required her to pay \$3.00 per day for parking. Complainant claims \$4,500 as parking expenses. Total mileage and parking expenses amount to \$29,000. Affidavit of Katherine Smulski, Appendix I.

17. The record establishes that Donald and Katherine Smulski generally maintained the same days of work and, therefore, were able to carpool together. There is no indication in the affidavit of Katherine Smulski that they would not continue to commute into work together. Therefore, her travel costs at very most would be no more than one-half of the amount claimed.<sup>[1]</sup> In addition, although Katherine Smulski would no longer have a parking expense, she would have daily commuting expenses from her home to the Burnsville Police Department. The record contains no estimate of the cost for Katherine Smulski's daily commute to the Burnsville Police Department.<sup>[2]</sup> A reasonable estimate of the mileage expense for daily travel from the Smulski residence in Apple Valley to the Burnsville Police Department is approximately \$4,900.

18. A reasonable parking and mileage expense equals one-half of the total mileage expense, reduced further by the mileage expense for traveling to the Burnsville Police Department (\$24,500 divided by two equals \$12,250 minus \$4,900 equals \$7,350). One-half of the parking expense equals \$2,250. A reasonable parking and mileage expense is \$2,250 plus \$7,350, or a total of \$9,600. Katherine Smulski's additional mileage and parking expenses as a result of her being denied the Burnsville police officer position amounts to a total of \$9,600.

#### Lost Sergeant's Wages

19. Complainant maintains that because Katherine Smulski did not take the Sergeant's Exam in September of 1990 due to the unfair discriminatory practices of Respondent, she incurred lost wages for the period September, 1990 to September, 1992. Complainant determined the lost wages by comparing the difference between an officer's wage and a sergeant's wage from September of 1990 to September of 1992. Affidavit of Katherine Smulski, Appendix II. Based on this computation, Complainant requests total lost sergeant's wages for the period September 1990 to September 1992 of \$25,186.

20. Complainant also requests additional lost sergeant's wages for the period September 1992 until when Katherine Smulski became a Sergeant in October 1993. The basis for this additional claim is that although Katherine Smulski took the Sergeant's Exam in September of 1992, she was not promoted to the rank of Sergeant until October of 1993. Complainant believes that the delay from September of 1992 to October of 1993 is directly related to chilling effect of Katherine Smulski's decision to wait until September 1992 to take the exam and, therefore, she should receive this additional amount of lost sergeant's wages. The total loss in sergeant's wages for the period in question, September of 1992 to October 1993, totals \$11,012.

21. After the Sergeant's examination is taken, a list of eligibles is created. Affidavit of Kathy O'Neill. Eligible Officers are promoted to Sergeant based on the order in which their names fall on the eligibles list. There is no information in the record and no proposal by Complainant where Katherine Smulski should be placed on the eligibles list. This information is needed to establish a start date.

22. The record is incomplete with respect to the appropriate start date for computation of lost Sergeant's wages. Based on this record, a determination of the time period for computation of lost Sergeant's wages cannot be made.

#### Findings Regarding Other Issues

23. Respondent has made no effort to establish that the civil penalty ordered in the Partial Order or the hearing and litigation costs to be awarded in this Order will result in financial hardship or that the Respondent will have a financial inability to pay either the civil penalty or the hearing and litigation costs.

24. Insofar as it is necessary, the Findings of Fact contained in the Partial Order issued on October 30, 1997 are incorporated in this Order and are expressly adopted by this Order.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. Minn. Stat. §§ 363.071, subd. 7 requires that the Judge order a respondent who has engaged in unfair discriminatory practices to reimburse the Minnesota Department of Human Rights for "all appropriate litigation and hearing costs expended". The appropriate litigation and hearing costs for this proceeding totals \$159,121 which should be divided as follows: (a) attorney's fees -- \$65,014; (b) other hearing and litigation costs -- \$94,107.

2. A decision regarding compensatory damages has been determined in the Partial Order. That decision, instead of awarding actual compensatory losses, represented an exercise of judgment vested in the Administrative Law Judge.

3. Because the Judge has already exercised his judgment to treble the actual losses, It is inappropriate to reopen and reconsider that decision to consider other items of compensatory loss.

4. Insofar as it is necessary, the Conclusions of Law contained in the Partial Order issued on October 30, 1997 are incorporated in this Order and are expressly adopted by this Order.

5. These Conclusions are also made for the reasons set forth in the attached Memorandum which is incorporated in and made a part of these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### ORDER

IT IS HEREBY ORDERED:

1. This Order is the **final decision** in this case and expressly incorporates and adopts the Partial Order issued on October 30, 1997.
2. Respondent shall pay to the University of Minnesota Civil Practice Clinic within thirty (30) days of the date of this Order the amount of \$65,014 as reasonable attorney's fees.
3. Respondent shall pay to the Minnesota Department of Human Rights \$94,107 as payment for litigation and hearing costs.
4. This Order is effective immediately upon the date below.

Dated this 30th day of January, 1998.

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ALLEN E. GILES  
Administrative Law Judge

MEMORANDUM

Hearing and Litigation Costs

Minn. Stat. § 363.071, subd. 7 requires that the Judge order a respondent who has committed unfair discriminatory practices to reimburse the Complainant for litigation and hearing costs; that provision provides in part as follows:

Subd. 7. **Litigation and hearing costs.** The administrative law judge shall order a respondent who is determined to have engaged in an unfair discriminatory practice to reimburse the department and the attorney general for all appropriate litigation and hearing costs expended in preparing for and conducting the hearing, unless payment of the costs would impose a financial hardship on the respondent. Appropriate costs include but are not limited to the costs of services rendered by the attorney general, private

attorneys if engaged by the department, administrative law judges, court reporters, and expert witnesses as well as the costs of transcripts and other necessary supplies and material.

All the litigation and hearing costs requested by Complainant comply with the guidelines established by subdivision 7 above. Fee awards are calculated in the same manner for both private counsel and nonprofit legal services organizations. Blum v. Stenson, 465 U.S. 886, 894 (1984); Shakopee Mdewakanton Sioux Community v. City of Prior Lake, Minnesota, 771 F.2d 1153,1160 (8th Cir. 1985). Therefore, the Civil Practice Clinic is eligible to receive a fee award similar to that of comparable private practitioners. However, the Civil Practice Clinic has requested that it be compensated at the rate charged by the Attorney General. The charges are reasonable and appropriate.

### Compensatory Damages

Complainant has submitted additional evidence regarding the compensatory losses of Donald and Katherine Smulski. The Judge has analyzed these losses and concluded that the reasonable total additional loss for travel expenses amounts to \$9,600. The Judge has been unable to determine an appropriate compensation period for Sergeant's lost wages. Complainant has requested that these compensatory losses be trebled by the Judge as was done with respect to the other compensatory losses identified in the Partial Order.

Respondent asserts that the lost Sergeant's wages claimed by Complainant are speculative.

The general purpose of the compensatory damages provision is to make victims of discrimination whole by restoring them to the same position they would have attained had no discrimination occurred. Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626 (Minn. 1988); Brotherhood of Railway and Steamship Clerks v. Balfour, 303 Minn. 178, 229 N.W.2d 3, 13 (1975).

The Judge's decision regarding compensatory damages represents a judgment that was made looking at the whole circumstance of the compensatory loss of Katherine and Donald Smulski. The Judge previously determined that in order to make them whole, to put them in the position that they would have been in had no discrimination occurred, it was necessary to treble the compensatory losses identified in the record of the proceeding. Trebling the actual compensatory loss is an exercise of judgment and discretion reposed to the Judge by Minn. Stat. § 363.071, subd. 2. That discretion must be exercised reasonably and appropriately in the circumstances that are given.

The Judge found that Katherine and Donald Smulski had compensatory losses that totaled \$24,233. However, for the reasons given in the Partial Order, the Judge firmly believed that that amount was inadequate to make Katherine and Don Smulski whole. In an exercise of the discretion vested in the Judge, the Judge determined that



to meet the “make whole” standard, trebling the compensatory losses was necessary. As more fully discussed in the Partial Order, it was the Judge's view that the unfair discriminatory practices prevented Katherine Smulski from achieving her lifetime employment goal. Katherine Smulski was the top candidate for the Burnsville police officer position. She was eliminated from contention based on the comments made by her Fourth Precinct supervisor. The Judge cannot place her in the Burnsville police officer position. The unfair discriminatory practices interrupted a successful partnership; the Judge cannot restore that partnership or the professional enrichment that might have come from it.

The compensatory judgment took all matters into consideration, including other damages awarded to Donald and Katherine Smulski. The Judge believes he exercised his judgment reasonably and appropriately to accomplish the result mandated by the “make whole” standard contained in the case law above.

The Judge has determined that he will not reconsider the judgment<sup>[3]</sup> regarding the compensatory loss in this case. The compensatory loss determined to be appropriate was not the actual loss. If the actual loss had been determined to be appropriate, there would be no concern with inclusion of these additional items of compensatory loss.

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<sup>[1]</sup> There is also a potential finding that the traveling expenses for Katherine Smulski would not be increased because she and Donald Smulski would continue to commute to work into Minneapolis. The Judge does not adopt this finding because the details of the travel expense are not being challenged by the Respondent. The Judge believes that it is reasonable, therefore, to view these expenses in the best possible light of the Complainant.

<sup>[2]</sup> The Judge does not believe that it is unreasonable to estimate that the distance from the Smulski residence to the Burnsville Police Department is four to five miles, making the round-trip approximately ten miles. At \$.28 per mile, a single daily commute would cost \$2.80. This amount times 250 working days would amount to \$700, and over seven years would make a total of \$4,900.

<sup>[3]</sup> The Judge recognizes that the additional items of compensatory loss have been submitted primarily as a result of the request by the Judge that these additional items of expense be identified. Nevertheless, upon consideration of these additional items of expense, the Judge is firmly convinced that in order to consider these additional items it would be necessary to reopen the judgment trebling the compensatory losses. Upon consideration, the Judge does not believe it is appropriate to do that.